

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**AJD, INC., A McDONALD'S FRANCHISEE, AND
McDONALD'S USA, LLC, JOINT EMPLOYERS**

**Cases: 02-CA-093895
02-CA-097827**

**LEWIS FOODS OF 42ND STREET, LLC, A
McDONALD'S FRANCHISEE, AND
McDONALD'S USA, LLC, JOINT EMPLOYERS**

**Cases: 02-CA-093893
02-CA-098662**

**18884 FOOD CORP., A McDONALD'S
FRANCHISEE, AND McDONALD'S USA, LLC,
JOINT EMPLOYERS**

**Cases: 02-CA-094224
02-CA-098676**

**14 EAST 47th STREET, LLC, A McDONALD'S
FRANCHISEE, AND McDONALD'S USA, LLC,
JOINT EMPLOYERS**

**Cases: 02-CA-094679
02-CA-098604**

**JOHN C FOOD CORP., A McDONALD'S
FRANCHISEE, AND McDONALD'S USA, LLC,
JOINT EMPLOYERS**

**Cases: 02-CA-093927
02-CA-098659**

**840 ATLANTIC AVENUE, LLC, A McDONALD'S
FRANCHISEE, AND McDONALD'S USA, LLC,
JOINT EMPLOYERS**

Case: 02-CA-097305

**1531 FULTON STREET, LLC, A McDONALD'S
FRANCHISEE, AND McDONALD'S USA, LLC,
JOINT EMPLOYERS**

**Cases: 02-CA-103771
02-CA-112282**

**McCONNER STREET HOLDING, LLC, A
McDONALD'S FRANCHISEE, AND
McDONALD'S USA, LLC, JOINT EMPLOYERS**

Case: 02-CA-098009

**McCONNER STREET HOLDING, LLC, A
McDONALD'S FRANCHISEE, AND
McDONALD'S USA, LLC, JOINT EMPLOYERS**

Case: 02-CA-103384

**MIC-EASTCHESTER, LLC, A McDONALD'S
FRANCHISEE, AND McDONALD'S USA, LLC,
JOINT EMPLOYERS**

Case: 02-CA-103726

BRUCE C. LIMITED PARTNERSHIP, A

Case: 02-CA-106094

**McDONALD’S FRANCHISEE, AND
McDONALD’S USA, LLC, JOINT EMPLOYERS**

and

**FAST FOOD WORKERS COMMITTEE AND SERVICE
EMPLOYEES INTERNATIONAL UNION, CTW, CLC**

**MCDONALD’S USA, LLC’S MOTION FOR A BILL OF PARTICULARS OR, IN THE
ALTERNATIVE, MOTION TO STRIKE JOINT EMPLOYER ALLEGATIONS AND
DISMISS THE COMPLAINT**

Pursuant to Section 102.24 of the National Labor Relations Board’s (“Board”) Rules and Regulations, Respondent McDonald’s USA, LLC (“McDonald’s”), by and through its undersigned counsel, hereby moves for an order requiring the Regional Director of Region 2 to specify with particularity in the Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing (“Complaint”) the factual basis upon which she relies in alleging that McDonald’s is a joint employer with its independent franchisees. In a case with far-reaching consequences for McDonald’s and franchisors throughout the country, and in which the General Counsel seeks to change the legal standard for determining joint employer status and has consolidated claims against 11 independent corporate entities based solely on allegations that McDonald’s is a joint employer, the Complaint contains only three vague, conclusory allegations regarding McDonald’s joint employer status. Namely, the Complaint alleges (1) the existence of a franchise agreement between McDonald’s and each independent franchisee, (2) a conclusory assertion that McDonald’s “possessed and/or exercised control over the labor relations policies” of each franchisee, and (3) a legal conclusion that McDonald’s is a joint employer. The Regional Director’s bare-bones allegations provide insufficient notice to McDonald’s of the basis for the alleged joint employer status, depriving McDonald’s of its fundamental right to due process

pursuant to the Fifth Amendment to the U.S. Constitution. In order for McDonald's to have a full and fair opportunity to defend itself against these unprecedented allegations, the Regional Director must first specify with particularity the underlying factual basis as to each and every franchisee.

If the Regional Director does not describe with particularity the basis for the allegations in the below-identified paragraphs, as mandated by the Administrative Procedure Act, Section 102.15 of the Board's Rules and Regulations, Paragraph 10266 of the Board's Casehandling Manual, and Section 300.3 of the NLRB Pleadings Manual-Complaint Forms, then McDonald's moves that such paragraphs of the Complaint be stricken and the Complaint against McDonald's be dismissed for failure to state a claim.

THE JOINT EMPLOYER ALLEGATIONS

To satisfy due process, the General Counsel is obligated "to clearly define the issues and advise an employer charged with a violation . . . of the specific complaint he must meet . . . [and the failure to do so] is . . . to deny procedural due process of law." Soule Glass Co. v. NLRB, 652 F.2d 1055, 1074 (1st Cir. 1981). *See also SFTC, LLC d/b/a Santa Fe Tortilla Company*, 360 NLRB. No. 130 at 2 n. 9 & 10 n. 6 (June 13, 2014) (affirming ALJ decision to dismiss allegations on due process grounds, in which ALJ explained, "[Respondent] is entitled to due process. That is, it is entitled to know ahead of time what alleged violations it must defend. It is, after all, a simple matter to prepare or amend a complaint that does so.") The Administrative Procedure Act, the Board's Rules and Regulations, and the Board's Casehandling Manual demand that the Complaint notify the Respondent of the facts and law at issue so the Respondent has a full and fair opportunity to prepare a defense. *See Administrative Procedure Act*, 5 U.S.C. § 554(b)(3) ("Persons entitled to notice of an agency hearing shall be timely informed of . . . the

matters of *fact and law* asserted”); NLRB Rules and Regulations, Rule 102.15 (“The complaint shall contain . . . a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent’s agents or other representatives by whom committed”); NLRB Casehandling Manual § 10268.1 (The Complaint “sets forth . . . the facts relating to the alleged violations by the respondent(s)”). And the NLRB Pleadings Manual-Complaint Forms also encourages descriptive pleading for joint employer allegations. *See* NLRB Pleadings Manual § 300.3(b) (suggesting drafter of a complaint containing a joint employer allegation should “[i]nset [a] description of [the] business venture. For example, Employer A utilizes the referral services of Employer B when hiring employees for its facility located at _____.”)

Here, paragraphs 5, 16, 25, 32, 41, 47, 55, 63, 69, 75 and 86 of the Complaint contain identical joint employer allegations that fail to satisfy these requirements. Each paragraph refers to the existence of a franchise agreement, states that McDonald’s “possessed and/or exercised control over the labor relations policies of” each franchisee, and asserts that McDonald’s is a joint employer with each franchisee. These allegations are plainly insufficient to establish a joint employer relationship under the legal standard for determining joint employer status. “The test for joint-employer status is whether two entities ‘share or codetermine those matters governing the essential terms and conditions of employment.’” *See Flagstaff Med. Ctr., Inc.*, 357 NLRB No. 65, 2011 WL 4498271, at *11 (Aug. 26, 2011) (quoting *Laerco Transportation*, 269 NLRB 324, 325 (1984)). The mere existence of a franchise agreement does not weigh in favor of a finding of joint employer status. Nor does the Complaint point to any provision of the franchise agreement that does so. Finally, the Complaint does not identify with any particularity how McDonald’s allegedly possesses and/or exercises control over the labor relations policies of its

franchisees, much less identify the labor relations policies at issue.

These paltry allegations do not provide McDonald's with notice of the charges against it or identify a particular standard of conduct that McDonald's engaged in to make it a joint employer. Accordingly, McDonald's cannot defend itself against these claims. Thus, the Regional Director should be ordered to provide the particulars of the seminal joint employer allegation, or those paragraphs should be stricken and the Complaint should be dismissed as to McDonald's.

WHEREFORE, having demonstrated that paragraphs 5, 16, 25, 32, 41, 47, 55, 63, 69, 75 and 86 in the above-captioned Complaint are insufficient pursuant to the Fifth Amendment to the U.S. Constitution, the Administrative Procedure Act, the Board's Rules and Regulations, the Board's Casehandling Manual, and the Board's Pleading Manual-Complaint Forms by virtue of failing to specify the factual basis for the joint employer allegations against McDonald's, McDonald's respectfully requests that:

(1) The Regional Director be ordered promptly to provide the specifics and particulars of those joint employer allegations contained in, and as to each franchisee named in paragraphs 5, 16, 25, 32, 41, 47, 55, 63, 69, 75 and 86 of the Complaint; and

(2) Upon the Regional Director's failure or inability to provide such specific and particular information to support the allegations in paragraphs 5, 16, 25, 32, 41, 47, 55, 63, 69, 75 and 86 of the Complaint, those allegations be stricken and the Complaint be dismissed as to McDonald's.

Dated: December 29, 2014

Respectfully submitted,

s/ Willis J. Goldsmith

Willis J. Goldsmith

Doreen S. Davis

Matthew W. Lampe

Joshua M. Grossman

Sharon S. Cohen

JONES DAY

222 East 41st Street

New York, New York 10017

Tel: 212.326.3939

Fax: 212.755.7306

wgoldsmith@jonesday.com

ddavis@jonesday.com

mwlampe@jonesday.com

jgrossman@jonesday.com

sharoncohen@jonesday.com

Jonathan M. Linas

JONES DAY

77 West Wacker Drive

Chicago, Illinois 60601

Tel: 312.269.4245

Fax: 312.782.8585

jlinas@jonesday.com

Attorneys for McDonald's USA, LLC

CERTIFICATE OF SERVICE

The undersigned, an attorney admitted to practice before the Courts of the States of Illinois and Missouri, affirms under penalty of perjury, that, on December 29, 2014, he caused a true and correct copy of McDonald's USA, LLC's Motion for A Bill of Particulars or, In the Alternative, Motion to Strike Joint Employer Allegations and Dismiss the Complaint, to be served upon counsel for the parties by e-mail (where indicated) and/or first-class mail in a postage-prepaid, properly addressed envelope at the following addresses designated for this purpose:

Gwynne Wilcox
Micah Wissinger
Michael Hickson
Vanessa Flores
Levy Ratner, P.C.
80 Eighth Avenue, 8th Floor
New York, NY 10011
gwilcox@levyratner.com
mwissinger@levyratner.com
mhickson@levyratner.com
vflores@levyratner.com

Robert Brody
Abby Warren
Brody and Associates
30 Wall Street, 8th Floor
New York, NY 10005
rbrody@brodyandassociates.com
awarren@brodyandassociates.com

Fast Food Workers Committee
2-4 Nevins St., Second Floor
Brooklyn, NY 11217

Geoffrey Dunham
Leah Z. Jaffe
National Labor Relations Board, Region 02
26 Federal Plaza, Suite 3614
New York, NY 10278-3699
geoffrey.dunham@nrlrb.gov
leah.jaffe@nrlrb.gov

Karen Fernbach
Region Director
National Labor Relations Board, Region 02
26 Federal Plaza, Suite 3614
New York, NY 10278-3699
Karen.Fernbach@nrlrb.gov

Mary Carlson
1100 New York Avenue, Suite 500 West, NW
Washington, DC 20005

Judith A. Scott, General Counsel
Service Employees International Union
1800 Massachusetts Avenue, NW
Washington, DC 20036-1806
judy.scott@seiu.org

s/Jonathan M. Linas

An Attorney for McDonald's USA, LLC